No. 83-751

# In the Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES AND EXCHANGE COMMISSION, ET AL.,
PETITIONERS

*v.*

JERRY T. O'BRIEN, INC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

REX E. LEE
*Solicitor General*

KENNETH S. GELLER
*Deputy Solicitor General*

SAMUEL A. ALITO, JR.
*Assistant to the Solicitor General*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

DANIEL L. GOELZER
*General Counsel*

PAUL GONSON
*Solicitor*

LINDA D. FIENBERG
*Associate General Counsel*

LARRY R. LAVOIE
*Assistant General Counsel*

HARRY J. WEISS
*Special Trial Counsel*

RUTH E. EISENBERG
*Special Counsel*

ELIZABETH A. SPURLOCK
*Attorney*

*Securities and Exchange Commission*
*Washington, D.C. 20549*

## QUESTION PRESENTED

Whether the Securities and Exchange Commission must notify "targets" of its non-public investigations when subpoenas are issued to third parties.

## PARTIES TO THE PROCEEDING

Petitioners (who were defendants and cross-defendants in the district court and appellees in the court of appeals) are the Securities and Exchange Commission and three employees of the Commission's Seattle Regional Office, Jack H. Bookey, Lane B. Emory, and George N. Prince.

Respondents are Jerry T. O'Brien, Inc., d/b/a Pennaluna & Co.; Jerry T. O'Brien; Benjamin A. Harrison; and Pennaluna & Co., Inc. (all of whom were plaintiffs in the district court and appellants in the court of appeals) and Harry F. Magnuson and H. F. Magnuson & Co. (who were defendants and cross-plaintiffs in the district court and appellants in the court of appeals).

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Miscellaneous—Continued: Page

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 83-751

SECURITIES AND EXCHANGE COMMISSION, ET AL., PETITIONERS

*v.*

JERRY T. O'BRIEN, INC., ET AL.

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE PETITIONERS

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 704 F.2d 1065. The order of the court of appeals denying rehearing and an opinion dissenting from the denial of rehearing (Pet. App. 25a-27a) are reported at 719 F.2d 300. The opinions of the district court (Pet. App. 9a-16a, 17a-24a) are not reported.

### JURISDICTION

The judgment of the court of appeals was entered on April 25, 1983. A timely petition for rehearing was denied on September 30, 1983 (Pet. App. 25a). The petition for a writ of certiorari was filed on November 4, 1983, and was granted on January 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

With the exception of Section 21(h) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(h), the pertinent provisions of the Securities Act of 1933 (Securities Act), 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934 (Securities Exchange Act), 15 U.S.C. 78a *et seq.*, are set forth in the appendix to the petition for a writ of certiorari (Pet. App. 31a-32a). Section 21(h) of the Securities Exchange Act is set forth in the Addendum, *infra*, 1a-6a.

## STATEMENT

1. In September 1980, the Securities and Exchange Commission issued a formal order of investigation authorizing certain employees of its Seattle Regional Office to issue subpoenas for information needed in connection with an investigation of possible violations of the federal securities laws (Complaint, Exh. A). The order stated (*id.* at 2) that the Commission's staff had reported to the Commission information that "tend[ed] to show" that respondent Harry F. Magnuson and others [1] had engaged in certain stock transactions and practices that violated registration, reporting, and antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. The formal order directed the staff to conduct a

---

[1] The formal order identified respondents Benjamin A. Harrison and Pennaluna & Co., Inc., as being among the others who may have participated in the reported transactions (Complaint, Exh. A). Respondent Harry F. Magnuson owns an accounting firm, respondent H.F. Magnuson & Co., and major interests in several corporations. Magnuson has been permanently enjoined from violating provisions of the federal securities laws. *SEC* v. *Golconda Mining Co. & Harry F. Magnuson*, 291 F. Supp. 125 (S.D.N.Y. 1968). Additionally, in 1970, the Commission permanently barred Magnuson and respondent Harrison from the broker-dealer industry for violations of the federal securities laws. *In re. Pennaluna & Co., Benjamin A. Harrison & Harry F. Magnuson*, 44 S.E.C. 336 (1970).

"private investigation" [2] into the transactions and, under authority granted in the 1933 and 1934 Acts, to subpoena testimony and documents "deemed relevant or material to the inquiry" (Complaint, Exh. A at 3).

During the course of its investigation, the staff subpoenaed Magnuson's customer records at respondent Jerry T. O'Brien, Inc. ("O'Brien"), a securities broker-dealer firm, as well as other information concerning Magnuson believed to be in the possession of Pennaluna & Co., Inc. (Complaint, Exhs. D, I). O'Brien complied with the subpoenas issued to it, but Pennaluna's counsel, who also represented O'Brien, notified the Commission that Pennaluna did not intend to comply (Complaint, Exh. N). The staff responded that it would recommend to the Commission that it institute a district court proceeding to have its subpoena enforced (Complaint, Exh. P). At the same time, in response to repeated inquiries from counsel, the staff informed O'Brien that it should consider itself a subject of investigation (*ibid.*).

Several days later, O'Brien, Pennaluna, and their individual owners [3] brought this suit in the United States District Court for the Eastern District of Washington to enjoin the Commission's investigation and to restrain Magnuson from complying with several outstanding subpoenas (Complaint 17-18). O'Brien alleged that the Commission's formal order was defective and that the staff

---

[2] The Commission's rules governing investigations expressly provide that, "[u]nless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public." 17 C.F.R. 203.5. See also 3 L. Loss, *Securities Regulation* 1955 (2d ed. 1961) (noting that virtually all Commission investigations are non-public); SEC, *Report of the Advisory Committee on Enforcement Policies and Practices* 18 (1972).

[3] Respondent Jerry T. O'Brien owns O'Brien, and respondent Harrison owns Pennaluna & Co., Inc. Since these respondents are jointly represented, we refer to them collectively as "O'Brien."

was conducting the investigation improperly.[4] Magnuson filed a cross-claim making similar allegations and seeking, among other things, to enjoin the investigation.

On September 28, 1981, the district court held a hearing on O'Brien's motion for expedited discovery. O'Brien sought to depose the Commission officers conducting the investigation and to obtain virtually all of the Commission's files concerning the investigation. At the hearing, the Commission informed the court that it would promptly move to dismiss the suit (Tr. 47-49), arguing that O'Brien merely wanted to discover what evidence the Commission had collected (Tr. 50, 58)[5] and that any discovery should be deferred. The district court denied the motion for expedited discovery, stating that O'Brien "wants to go through your pockets, I realize that" (Tr. 58). At the court's request, the Commission agreed to delay any proceedings for enforcement of the outstanding subpoenas until the court determined whether the suit should be dismissed (Tr. 54, 56, 61, 70).

2. In January 1982, the district court dismissed respondents' claims for injunctive relief, reasoning that their challenges to the investigation could be litigated if

---

[4] Respondent O'Brien alleged, among other things, that the Commission's formal order did not expressly name it and others under investigation and that therefore the Commission had not found that each person being investigated had likely committed a violation (Complaint 3-16); that the Commission did not have a valid purpose for its investigation and should have provided each person subject to the investigation with notice of, and the opportunity to comment on, the commencement of the investigation (*id.* at 10); that the Commission was reinvestigating matters litigated and settled by the parties in 1975 (*id.* at 9); and that the Commission had violated the constitutional, statutory, and common law privacy rights of the persons subject to the investigation (*id.* at 10, 14).

[5] In urging expedited discovery, respondent O'Brien conceded, "I'm not here today to say that the S.E.C. has done anything wrong, I can't prove it, I haven't had the discovery. What we're asking is for some limited discovery to be able to see if the S.E.C. has exceeded its powers" (Tr. 33).

and when the Commission instituted a subpoena enforcement action in district court (Pet. App. 17a-24a). The court nevertheless determined (*id.* at 18a-22a) that the outstanding subpoenas "fully me[t] the four-part * * * test" for judicial enforcement set forth in *United States* v. *Powell*, 379 U.S. 48 (1964). The court found that the Commission's formal order of investigation stated a legitimate purpose, that the subpoenas requested relevant information, that the information sought was not already in the Commission's possession, and that the Commission had followed proper administrative steps in issuing the subpoenas (Pet. App. 19a-21a).[6]

Respondents appealed and moved the district court for an injunction pending appeal. In that motion, respondents for the first time sought notice of subpoenas issued to third parties. The district court issued a second order declining to "fashion such a novel remedy" (Pet. App. 12a). The court explained that respondents lacked standing to restrain voluntary compliance with subpoenas issued to others and, in any event, had adequate remedies at law (*id.* at 13a). The court of appeals also denied respondents' motion for a stay pending appeal.

The Commission then sought enforcement of outstanding subpoenas. In two separate proceedings involving subpoenas to Magnuson's family members and his bank, the courts rejected challenges to the lawfulness of the investigation.[7] Despite these rulings, the Commission has yet to

---

[6] The district court found it unnecessary to consider the Commission's compliance with *Powell* "[w]ith respect to [subpoenas issued to] plaintiff O'Brien personally" because he had "voluntarily complied" with [them] (Pet. App. 21a). The court expressed reservations, however, concerning the merits of O'Brien's contention that he personally had not been properly "targeted" in the formal order of investigation (Pet. App. 19a n.2; see also *id.* at 11a n.4).

[7] See *SEC* v. *Magnuson*, No. 82-1178-Z (D. Mass. Aug. 11, 1982) (enforcing three Commission subpoenas directed to Magnuson family members); *Magnuson* v. *SEC*, No. 82-2042 (D. Idaho July 27, 1982) (denying Magnuson's and his wife's motions under the Right

obtain information directly from Magnuson. The Commission brought a subpoena enforcement proceeding against Magnuson and other respondents in this case in which the legitimacy of the Commission's investigation was again contested. That proceeding has been under submission for more than one and one-half years.[8]

3. In April 1983, the court of appeals affirmed the dismissal of all respondents' injunctive claims except their request for notice of subpoenas issued to others (Pet. App. 1a-8a). The court of appeals agreed with the district court that respondents had an adequate remedy at law to challenge subpoenas directed to them (*id.* at 3a-4a). It also agreed that, under *United States* v. *Miller*, 425 U.S. 435 (1976), and *Donaldson* v. *United States*, 400 U.S. 517 (1971), respondents had no right to block disclosure of documents held by third parties (Pet. App. 6a). The court stated, however, that even if "targets" of investigations have no right to protect evidence in the hands of a third party, they "have a right to be investigated consistently with the *Powell* standards" (Pet. App. 6a-7a).[9] To protect this right, the court concluded, "targets" are entitled to notice of every subpoena issued in an investigation (*id.* at 7a). The court reasoned that "targets" would then have the opportunity to challenge each subpoena's compliance with *Powell* by attempting to restrain third parties' voluntary compliance, seeking permissive intervention in subpoena enforcement proceedings, or filing "other appropriate district court proceedings" (*id.* at 4a-5a, 7a).

---

to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.*, to quash subpoenas directed to a financial institution).

[8] *SEC* v. *Magnuson, et al.*, No. C-82-282-RJM (E.D. Wash.) (under submission since July 1982).

[9] The court of appeals did not define "target," a term not found in the federal securities laws or in the Commission's rules governing its investigations. See 17 C.F.R. 203.1 *et seq.* See pages 32-33, *infra*.

The court of appeals cited no constitutional or statutory basis for ordering such notice, and it rejected the Commission's contention that in federal agency investigations "courts may not impose procedural requirements upon agencies" beyond those required by the Constitution or statutes (Pet. App. 5a-6a n.8).[10] The court did not discuss the impact that its notice requirement might have on law enforcement, other than to state its view that notice would not "unduly burden the agency or the courts" since compliance with *Powell* could be determined on affidavits (*id.* at 7a).

4. The Commission filed a petition for rehearing with a suggestion for rehearing en banc. The Commission's petition was supported by an amicus curiae brief filed by the United States on behalf of more than 20 agencies whose practices were threatened by the decision (U.S. Am. Br. 2 n.1).

The court of appeals denied the Commission's petition, with five judges dissenting (Pet. App. 25a-27a). Writing for the dissenters, Judge Kennedy stated that the panel's "most erroneous" decision "goes beyond any reasonable interpretation" of *Powell* and *Miller* and constitutes "an improper intrusion" into administrative practices (Pet. App. 26a). Furthermore, he expressed concern that the decision would have adverse consequences on law enforcement (*id.* at 26a-27a):

> Not only will wrongdoers be provided a new instrument of obstruction or delay, but also employees and others subject to reprisals will be chilled from cooperating with investigators. Under the panel decision, government agencies will find it increasingly difficult to conduct confidential, nonpublic investigations in which actual targets are not discovered until a number of subpoenas have been served.

---

[10] The court of appeals did not disturb the district court's *Powell* findings, holding that the appeal "present[ed] only questions of law" (Pet. App. 1a).

> Agencies may instead be forced to articulate premature conclusions about potential targets.

Finally, Judge Kennedy emphasized that "[t]here is no principled basis for confining the panel holding to the context of an SEC investigation. It threatens to compromise government investigations by most agencies" (*id.* at 26a).

## SUMMARY OF ARGUMENT

There is no basis for the court of appeals' decision requiring the Commission to give so-called "targets" of its investigations notice of all subpoenas issued to third parties.

### I

As respondents concede, the decision below is not supported by any constitutional provision. After exhaustively reviewing the procedures used by agencies in non-adjudicative investigations, this Court held in *Hannah* v. *Larche*, 363 U.S. 420 (1960), that neither the Due Process Clause of the Fifth Amendment nor the Confrontation Clause of the Sixth Amendment requires an agency to notify "targets" of the collection of adverse evidence or the identity of accusers. This Court has also held that an individual's Fifth Amendment privilege against self-incrimination is not violated when records held by a third party are subpoenaed. *Fisher* v. *United States*, 425 U.S. 391, 397 (1976). Finally, the Court has repeatedly held that the Fourth Amendment does not afford an individual a protectable interest in records held by third parties or the right to notice of or the opportunity to challenge the validity of subpoenas for such records. *United States* v. *Miller*, 425 U.S. 435 (1976); *Donaldson* v. *United States*, 400 U.S. 517 (1971).

### II

There is also no statutory basis for the court of appeals' notice requirement. The language, scheme, and

legislative history of the Securities Act of 1933 and the Securities Exchange Act of 1934 demonstrate that Congress did not intend to require the Commission to furnish "targets" with notice of third-party subpoenas. In those statutes, Congress empowered the Commission to investigate promptly and effectively, to employ subpoenas in aid of its investigations, and to fashion, within constitutional limits, its own procedures for conducting investigations. See 15 U.S.C. 77s(b), 77v(b), 78u(a), (b) and (c). Nowhere in those laws or their legislative history is there any hint that Congress intended to hamstring the Commission with a requirement that it notify so-called "targets" of its investigations each time subpoenas are issued to third parties.

When Congress has intended to require the Commission to provide notice of the issuance of its subpoenas, it has done so expressly in carefully crafted legislation designed to ensure that notice cannot be used to delay or obstruct investigations. In 1980, Congress enacted Section 21(h) of the Securities Exchange Act, 15 U.S.C. 78u(h), incorporating into the federal securities laws the Right to Financial Privacy Act of 1978 (RFPA), 12 U.S.C. 3401 *et seq.* Under Section 21(h), the Commission now must provide notice in narrowly defined circumstances: "customers" must be notified when the Commission subpoenas certain records from "financial institutions." But Section 21(h) and the RFPA contain extensive safeguards to prevent undue interference with Commission investigations. For example, a customer has only a short period within which to challenge the subpoena in court; a prompt judicial decision is required; the customer may not appeal any adverse decision until the Commission completes its investigation; and all applicable statutes of limitations are tolled during the pendency of the challenge. By enacting this limited notice provision, Congress clearly expressed its understanding that the Commission was not obligated to furnish notice of its subpoenas in other circumstances.

## III

The court of appeals' sole stated reason for imposing its notice requirement was to enforce compliance with *United States* v. *Powell*, 379 U.S. 48 (1964). But *Powell* provides no support for the decision below.

In *Powell*, the Court interpreted the Internal Revenue Code to require the Internal Revenue Service to make a certain showing when it seeks judicial enforcement of an administrative summons. *Powell* had nothing to do with notice of third-party subpoenas, and the Court's opinion said nothing about that subject. *Powell* was concerned exclusively with the rights of a recipient of a summons, not with the rights of a "target." Thus, the premise of the court of appeals' decision—that a "target" has a "right to be investigated consistently with the *Powell* standards" (Pet. App. 6a)—is fundamentally incorrect.

Furthermore, a "target" may not object on *Powell* grounds when an agency obtains records without a subpoena or when a third-party recipient voluntarily complies with a subpoena. Even when a district court proceeding is brought against a third party for enforcement of a subpoena, a "target" has no right to intervene and question compliance with *Powell*. At most, the "target" may seek permissive intervention. These settled principles refute the notion that "targets" have a general, enforceable right "to be investigated consistently with" *Powell*.

## IV

The court of appeals' notice requirement will cause serious, adverse consequences to law enforcement that Congress simply could not have intended. Notice will provide "targets" with a road map of agency investigations, thereby increasing their ability to destroy evidence, influence testimony, threaten or bribe witnesses, and abscond with assets. Additionally, persons receiving notice may delay and obstruct investigations by challenging every subpoena. Such delay is particularly damaging

to the Commission, whose ability to protect the nation's securities markets depends on the rapid exercise of its investigative powers. Furthermore, the court of appeals' decision leaves unanswered numerous critical questions, including the definition of a "target," the rights of a "target" following notice, and the remedies for noncompliance with the notice requirement. Such uncertainties, which Congress carefully avoided in enacting the limited notice requirement contained in the RFPA, threaten many important investigations conducted by the Commission and other law enforcement agencies.

## ARGUMENT

### THE SECURITIES AND EXCHANGE COMMISSION IS NOT REQUIRED TO NOTIFY "TARGETS" OF ITS INVESTIGATIONS THAT SUBPOENAS HAVE BEEN ISSUED TO THIRD PARTIES

#### A. The Court Of Appeals' Notice Procedure Is Not Required By The Constitution, By Any Statute Or Rule, Or By Any Decision Of This Court

Since its inception 50 years ago, the Securities and Exchange Commission has conducted investigations without providing "targets" with notice of, or the opportunity to challenge, the gathering of information from other persons by subpoena. The Commission's investigations have no parties and no designated "targets"; they do not adjudicate facts or legal rights.[11] Rather, Commission investigations are conducted to determine whether law enforcement proceedings—in which rights of parties are adjudicated—should be commenced. See, *e.g.*, Section 20(b) of the Securities Act, 15 U.S.C. 77t (b) and Section 21(a), (d) and (e) of the Securities Exchange Act, 15 U.S.C. 78u(a), (d) and (e); 17 C.F.R.

[11] See *Hannah* v. *Larche*, 363 U.S. 420, 446-447 (1960); *In re SEC*, 84 F.2d 316, 318 (2d Cir.), rev'd as moot, 299 U.S. 504 (1936).

202.5. Thus, the Commission's regulations provide for notice and other rights in adjudicative proceedings, but not in investigations.[12] When the staff intends, at the conclusion of an investigation, to recommend to the Commission that it commence an adjudicative proceeding, it is authorized to explain to interested persons the nature of its investigation and to afford them the opportunity to make a written submission to the Commission concerning their views.[13]

The Commission has the authority under all the statutes it administers to issue subpoenas in aid of its investigations and to invoke the assistance of the federal courts in their enforcement (see Pet. App. 31a-38a). The Commission maintains stringent internal controls on the use of its subpoena powers. The staff has no authority to issue subpoenas without Commission authorization. Before it may issue subpoenas, the staff must obtain from the Commission's presidentially-appointed members a "formal order of investigation" authorizing use of sub-

[12] The Commission's Rules of Practice, 17 C.F.R. 201.1 *et seq.*, establish the procedures applicable in adjudicative proceedings "which involve a hearing or opportunity for hearing before the Commission." The Rules of Practice provide for, among other things, notice, hearing and cross-examination. 17 C.F.R. 201.6, 201.9. By contrast, the Commission's Rules Relating to Investigations, 17 C.F.R. 203.1 *et seq.*, do not provide for such trial-type procedures. Since at least 1936, the Commission's rules have expressly made trial-type procedures, such as notice, inapplicable to investigations. See *SEC 2d Ann. Rep.* 73 (1936). The Commission's rules, however, afford all witnesses the opportunity, upon request, to be shown the formal order of investigation. 17 C.F.R. 203.7(a).

[13] 17 C.F.R. 202.5(c); Securities Act Release No. 5310 (Sept. 27, 1972). Even at the point at which the staff has determined to recommend that the Commission commence enforcement proceedings, there is no constitutional or statutory requirement that the Commission notify prospective defendants. "Mandating such a procedure would seriously burden the Commission's enforcement procedure, already characterized by adequate due process safeguards." *SEC* v. *National Student Marketing Corp.*, 538 F.2d 404, 407 (D.C. Cir. 1976), cert. denied, 429 U.S. 1073 (1977).

poenas by designated staff members in investigating particular transactions. 17 C.F.R. 202.5(a).[14]

### 1. *The Constitution does not require the Commission to provide "targets" of its investigations with notice of subpoenas issued to other persons*

The court of appeals cited no provision of the Constitution to support its holding that the Commission must depart from its historic practices and provide "targets" of its investigations with notice of the gathering of information from others by subpoena. Respondents concede that "[t]he court of appeals decision is not based on constitutional provisions" (O'Brien Br. in Opp. 21 n.14; see Magnuson Br. in Opp. 2, 26).[15]

The court of appeals and respondents presumably recognize that this Court's decisions foreclose any argument that the Constitution requires notice to "targets" concerning subpoenas issued to others. In *Hannah* v. *Larche*, 363 U.S. 420 (1960), this Court exhaustively examined the procedures that have historically governed investigations conducted by grand juries, legislative com-

---

[14] See H.R. Rep. 96-1321 (Pt. 1), 96th Cong., 2d Sess. 4 n.2 (1980):

> [T]he staff has no authority to issue compulsory process without Commission approval. When it appears that the issuance of process may be necessary to develop the facts concerning a matter under inquiry, the staff brings the matter to the Commission's attention. If the Commission, by majority vote of its five congressionally approved members, concurs with the staff's assessment, a formal order of investigation issues. This order sets forth, among other things, the names of the specific staff members authorized to issue subpoenas in conjunction with the investigation and the statutory authority pursuant to which the Commission has adopted the order.

[15] Notwithstanding the fact that the court of appeals did not rely on any constitutional provision, one district court in the Ninth Circuit has construed the decision as holding that there is a "due process right to notice of third party subpoenas." *Wedbush, Noble, Cooke, Inc.* v. *SEC*, No. CV-83-3961 (CBM) (KX) (July 11, 1983), appeal pending, No. 83-6035 (C.D. Cal.).

mittees, and executive and independent agencies, including the Commission. The Court concluded that neither the Due Process Clause of the Fifth Amendment nor the Confrontation Clause of the Sixth Amendment requires an agency to notify persons under investigation of the collection of adverse evidence, the identity of their accusers, or the specific charges being investigated. The Court explained (363 U.S. at 449-451) that the Due Process Clause does not require such notice in agency investigations since the investigations do not adjudicate legal rights. The Court added (*id.* at 440) that such notice is not required by the Confrontation Clause because its protections become applicable only when criminal proceedings have been initiated. *Id.* at 440 n.16. And the Court observed (*id.* at 443-444) that requiring "trial-like" procedures, such as notice, would "make a shambles of the investigation and stifle the agency in its gathering of facts."

This Court has also held that the Fifth Amendment's privilege against compelled self-incrimination does not apply to a subpoena issued to a third party since such a subpoena does not compel the "target" to give testimony. *Fisher* v. *United States*, 425 U.S. 391, 397 (1976); *Couch* v. *United States*, 409 U.S. 322, 328-329 (1973). Cf. *United States* v. *Washington*, 431 U.S. 181, 189 (1977) (one's status as a "target" of a grand jury investigation "neither enlarges nor diminishes the [Fifth Amendment] protection against compelled self-incrimination," and thus prosecutors need not provide special notice to a "target").

Nor does the Fourth Amendment provide a basis for the court of appeals' notice requirement. In *United States* v. *Miller*, 425 U.S. 435, 443 (1976), and *Donaldson* v. *United States*, 400 U.S. 517, 522, 530, 531 (1971), this Court held that the Fourth Amendment does not afford a "target" of an investigation rights to notice of or the opportunity to challenge the validity of government subpoenas directed to other persons. In *Miller*, the

Court affirmed a criminal conviction based upon information obtained from the defendant's banks, without his knowledge, pursuant to defective government subpoenas. The Court confirmed its repeated holding that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that * * * confidence placed in the third party will not be betrayed" (425 U.S. at 443).[16] Consequently, the Court explained, the validity of the subpoenas was irrelevant since "[t]he banks upon which they were served did not contest their validity." *Id.* at 446 n.9. The failure to notify the customer of the issuance of subpoenas was likewise "without legal consequences" since the defendant lacked a Fourth Amendment interest in the subpoenaed records. 425 U.S. at 443 n.5. See also *United States* v. *Payner*, 447 U.S. 727, 731-732, 735 (1980).

In *Donaldson*, the Court held that the "target" of an investigation had no right to restrain a third party's voluntary compliance with an Internal Revenue Service summons based solely on the "target's" potential civil or criminal liability. 400 U.S. at 530-531. The Court further recognized that, were it to allow the "target" to restrain voluntary compliance by others and then to intervene in summons enforcement proceedings, it "would unwarrantedly cast doubt upon and stultify the [IRS's] every investigatory move." *Id.* at 531.

---

[16] In *Miller*, the Court held that Congress's passage of the Bank Secrecy Act did not alter the well-settled principle that an agency subpoena "directed to a third party bank does not violate the Fourth Amendment rights of a depositor under investigation." 425 U.S. at 444. See also *Donaldson* v. *United States*, 400 U.S. at 522.

### 2. *The Securities Act and the Securities Exchange Act authorize the Commission to investigate privately without providing "targets" with notice of subpoenas issued to other persons*

The court of appeals cited no statutory basis for its notice procedure; nor did it consider the Commission's governing statutes or its rules. Respondents nevertheless interpret the court of appeals' notice procedure as based upon the statutes that authorize the Commission to use subpoenas (O'Brien Br. in Opp. 6; see Magnuson Br. in Opp. 21, 24, 26). They state that Congress required the Commission to invoke the aid of the federal courts for enforcement of its subpoenas in order to "check and balance possible abuse" (O'Brien Br. in Opp. 13-14; *id.* at 9; Magnuson Br. in Opp. 22, 30). Accordingly, respondents reason that notice to "targets" is necessary to effectuate the intended statutory check since third parties do not have the incentive to litigate the agency's compliance with its obligations (O'Brien Br. in Opp. 6-7, 8, 9, 13-14; Magnuson Br. in Opp. 22, 36).

As we demonstrate, however, the court of appeals' notice procedure conflicts with the language, context, history, and purposes of the provisions authorizing the Commission's use of subpoenas. There is no evidence that Congress ever intended to hamstring the Commission and other law enforcement agencies with the procedural requirement devised by the court of appeals. On the contrary, in those narrow circumstances in which Congress intended that the Commission afford notice of its subpoenas, Congress has expressly so provided.

a. As this Court has emphasized repeatedly, the starting point in any case involving the interpretation of a statute is the language employed by Congress. *INS* v. *Phinpathya*, No. 82-91 (Jan. 10, 1984), slip op. 5; *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 580 (1982); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976). Furthermore, it is " 'assume[d] that the legisla-

tive purpose is expressed by the ordinary meaning of the words used.'" *INS* v. *Phinpathya*, slip op. 5), quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979), and *Richards* v. *United States*, 369 U.S. 1, 9 (1962)).

Nothing in the language of the relevant provisions of the securities laws—Sections 19(b) and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b), 77v(b), and Sections 21(a), (b) and (c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a), (b) and (c)—even remotely suggests that Congress intended to provide "targets" of Commission investigations with the right to notice of third-party subpoenas.[17] These statutory provisions give the Commission broad discretion to conduct such investigations as it deems necessary in order to inquire into possible violations of the Acts. 15 U.S.C. 77s(b); 15 U.S.C. 78u(a). They authorize "any member of the Commission" or designated officer to "subpoena witnesses" and "require the production" of relevant records in aid of any investigation "from any place in the United States or any Territory at any designated place of hearing." 15 U.S.C. 77s(b); 15 U.S.C. 78u(b). In addition, they authorize the Commission to apply to the appropriate federal court for enforcement of the Commission's subpoenas. 15 U.S.C. 77v(b); 15 U.S.C. 78u(c). By their terms, these provisions prescribe only the persons who may issue subpoenas, the territorial limits of subpoenas, and the proper venue for subpoena enforcement actions. Notably absent is any requirement that

---

[17] **The present case concerns an investigation authorized by and subpoenas issued under provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 (see Complaint, Exh. A), and we therefore discuss the provisions of those Acts governing Commission subpoenas and investigations. Other securities laws enforced by the Commission (see Pet. App. 33a-38a) likewise contain no provisions that support the notice requirement imposed by the court of appeals.**

so-called "targets" be given notice of third-party subpoenas.

Nor is there anything in the legislative schemes of the 1933 and 1934 Acts to suggest that Congress intended to impose notice procedures on Commission investigations.[18] Both Acts delegate to the Commission the "power to make such rules and regulations as may be necessary or appropriate to implement their provisions * * *." Section 23(a)(1) of the Securities Exchange Act, 15 U.S.C. 78w(a)(1); Section 19(a) of the Securities Act, 15 U.S.C. 77s(a). Such language, this Court has held, is broad enough to empower the Commission to establish, within constitutional limits, "standards for determining whether to conduct an investigation publicly or in private * * *." See *FCC* v. *Schreiber*, 381 U.S. 279, 292 (1965).[19] The Commission has determined that it must be able to conduct its investigations in private, without alerting "targets" to subpoenas, in order to detect and prevent manipulation, fraud, and other misconduct affecting the nation's securities markets. This decision is "well within the Commission's statutory authority." *Id.* at 288.

Finally, there is nothing in the legislative history of the 1933 or 1934 Acts to suggest that Congress did not mean what it plainly said—that the Commission is free, within constitutional limits, to establish its own inves-

---

[18] By contrast, in the Securities Act and the Securities Exchange Act, Congress prescribed notice and hearing procedures for adjudicatory proceedings. See Sections 8(b) and 21 of the Securities Act, 15 U.S.C. 77h(b) and 77u; Sections 15(b)(1) and 22 of the Securities Exchange Act, 15 U.S.C. 78*o*(b)(1) and 78v. See also *SEC* v. *Torr*, 15 F. Supp. 144 (S.D.N.Y. 1936).

[19] See also *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940) (administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties"); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 321-322 (1933).

tigatory procedures. Indeed, the legislative history amply reflects Congress's intent to delegate to the Commission a maximum degree of administrative flexibility[20] and the tools necessary to conduct timely and effective investigations.[21]

b. Congress's amendment of Section 21 of the Securities Exchange Act in 1980 confirms that it knows how to require the Commission to give notice of its subpoenas and has done so expressly and in elaborate detail in those narrow circumstances in which it has found notice desirable. In Section 21(h)(1), 15 U.S.C. 78u(h)(1), Congress incorporated into the federal securities laws the Right to Financial Privacy Act of 1978 (RFPA).[22] The RFPA creates a limited statutory right in "customers" of banks and similar financial institutions to privacy for

---

[20] See, *e.g.*, H.R. Rep. 1383, 73d Cong., 2d Sess. 7 (1934); see also *id.* at 6.

[21] As it explained when it amended Section 21 of the Securities Exchange Act in 1980, "Congress [has] endowed the Commission with 'broad powers' to conduct investigations in support of its statutory mandate to protect the public interest through *prompt and effective* enforcement of the federal securities laws." H.R. Rep. 96-1321 (Pt. 1), 96th Cong., 2d Sess. 6 (1980) (emphasis added). See also *id.* at 5 n.4 ("As the courts have recognized, '[t]he very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties * * * is the rapid exercise of the power to investigate.' *FMC* v. *Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975)").

[22] The RFPA expressly exempted the Securities and Exchange Commission from its coverage for a period of two years. 92 Stat. 3710. In addition, Congress created in Section 21(h)(2) of the Securities Exchange Act a special exemption for the Commission from the RFPA's pre-access notification requirements. Section 21(h)(2) empowers the Commission to seek an ex parte court order authorizing it to delay giving notice on the grounds, among others, that the Commission has reason to believe that notice would result in the destruction of, or tampering with, evidence; the transfer of assets or records outside the territorial limits of the United States; or the improper conversion of investor assets. 15 U.S.C. 78u(h)(2).

records that reflect their private transactions. 12 U.S.C. 3401. It does not confer upon "targets" a right to notice of subpoenas directed to "third parties."

The RFPA provides, among other things, that "customers" are entitled to notice of and the opportunity to challenge administrative subpoenas to their "financial institutions" for certain "financial records." 12 U.S.C. 3401, 3405. It prescribes the persons entitled to notice, the types of records that are protected, and the circumstances in which notice is unnecessary or may be deferred. 12 U.S.C. 3401(4), 3401(2), 3409, 3413, 3414. The RFPA thus requires a "target" of a Commission investigation to be notified of a subpoena only in those limited circumstances in which he also is a "customer," [23] the subpoena seeks information from a "financial institution," and the information sought constitutes a "financial record" as defined by the Act.

The RFPA contains numerous carefully crafted provisions that ensure that notice cannot be used to obstruct or delay an agency investigation. Under the Act, the customer has only a short period within which to file a "customer challenge" proceeding in court. 12 U.S.C. 3410(a). In addition, the customer has no right to appeal any adverse determination until the government's investigation is completed and no standing to assert the rights of the bank. 12 U.S.C. 3410(d), 3410(f). The government's law enforcement efforts are further protected by provisions that expressly permit the government to obtain in camera review of its response to a customer challenge, require a judicial decision on the challenge

---

[23] The term "customer" means "any person" or authorized representative of that person who utilizes the services of a financial institution. 12 U.S.C. 3401(5). A "person" is defined as "an individual or a partnership of five or fewer individuals." 12 U.S.C. 3401(4). Since the Act expressly excludes corporations from the definition of a "customer," several of the respondents in this case would not be entitled to notice, even under the RFPA, if the Commission subpoenaed their bank records.

within seven days of the government's response, require the financial institution to assemble the subpoenaed documents for production during the pendency of the challenge, and, perhaps most important, toll any applicable statute of limitations until the challenge is decided. 12 U.S.C. 3410(b), 3411, 3419. Finally, the Act makes the "challenge procedures * * * the sole judicial remedy available to a customer to oppose disclosure of financial records pursuant to this title." 12 U.S.C. 3410(e).

The strictly limited statutory right to notice provided by Section 21(h) demonstrates that Congress did not intend that the Commission be subject to the broad, ill-defined notice requirement imposed by the court of appeals. "'[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 14-15 (1981) (quoting *Transamerica Mortgage Advisors* v. *Lewis*, 444 U.S. 11, 19 (1979)). See also *United States* v. *Erika*, 456 U.S. 201, 208 (1982); *Andrus* v. *Allard*, 444 U.S. 51, 62 (1979). If Congress had wanted to construct the type of procedural right created by the court of appeals in this case, it could easily have done so.[24] The fact that Congress did not do so compels the conclusion that it was simply unwilling to impose such a generalized procedural burden on the Commission and other law enforcement agencies.[25]

---

[24] For example, it could have substituted the word "target" for the word "customer" in Section 21(h) or in the RFPA, and could have made the notification procedure applicable to all subpoenas, not just those that are issued to financial institutions and seek a limited class of records.

[25] It is significant that Congress has declined to extend even the limited notice procedures of the RFPA to other types of records. See, *e.g.*, H.R. 933, 97th Cong., 1st Sess. (1981) (proposing notice with regard to telephone records); S. 1375, 97th Cong., 1st Sess. (1981) (same). See also *Smith* v. *Maryland*, 442 U.S. 735, 744-745 (1979).

c. The legislative history of Section 21(h) and the RFPA amply supports this conclusion. The RFPA was a congressional response to this Court's decision in *United States* v. *Miller* that a customer of a bank has "no standing under the Constitution to contest Government access to financial records." H.R. Rep. 95-1383, 95th Cong., 2d Sess. 34 (1978). The RFPA was intended, however, "to strike a balance between customers' right of privacy and the need of law enforcement agencies to obtain financial records pursuant to legitimate investigations," a balance that the decision below overturns.[26] Congress expressly stated its intent that this balance should not be altered by judicial implication of additional remedies. H.R. Rep. 95-1383, at 54, 56, 225, 230. Congress also exempted the Commission from the RFPA for a period of two years, "in recognition of [the Commission's] rigorous internal procedures" for using its subpoena powers and its need to obtain financial records promptly in its investigations. H.R. Rep. 95-1383, at 247.

When Congress finally applied the RFPA to the Commission in 1980, it again attempted to "ensur[e] that the assertion of privacy rights [would] not serve as a sword for delay and obstruction." H.R. Rep. 96-1321 (Pt. 1), at 4. Accordingly, as mentioned above (see page 19 note 21, *supra*), Congress created in new Section 21(h)(2) of the 1934 Act a special exemption for the Commission from the RFPA's pre-access notification requirements because of its concern that "delay in conducting an investigation could impede the Commission in taking the remedial action necessary to protect the investing public and the securities markets." H.R. Rep. 96-1321 (Pt. 1), at 8. Congress also reiterated its caveat against judicial implication of remedies not expressly provided for

---

[26] See H.R. 95-1383, at 33. See also *id.* at 245-246 (noting that the Act achieves a very "delicate balance" between the individual's statutory right to privacy and "the right of members of our society to full and efficient enforcement of our Federal laws * * *"); H.R. Rep. 96-1321 (Pt. 1), 96th Cong., 2d Sess. 2 (1980).

by the Act. See, *e.g.*, H.R. Rep. 96-1321, at 10 (noting that the remedies for a violation of the RFPA "shall not be supplemented by judicially imposed suppression of any financial records * * *").

Thus, Congress forcefully demonstrated its intent that notice procedures should be required only where it has imposed them. The court of appeals was not free "to ignore this legislative judgment." *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. at 18. Nor was it authorized to "rewrite [the] legislation in accord with [its] own conceptions of prudent public policy." *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979); see also *id.* at 559. "The question [was] not what [the] court [thought was] generally appropriate to the regulatory process; it [was] what Congress intended * * *." *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977).[27]

### 3. *This Court's decision in* United States *v.* Powell *does not confer a procedural right to notice upon "targets" of agency investigations*

The court of appeals interpreted this Court's decision in *United States* v. *Powell*, 379 U.S. 48 (1964), as conferring upon "targets" of agency investigations a right to be investigated by third-party subpoenas that would

---

[27] See also *Baltimore Gas & Electric Co.* v. *NRDC*, No. 82-524 (June 6, 1983), slip op. 9; *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 536 n.26 (1982) ("These policy considerations were for Congress to weigh, and we are not free to ignore the language and history of Title IX even if we were to disagree with the legislative choice."); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 97 (1981) ("The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs"); *Steadman* v. *SEC*, 450 U.S. 91, 104 (1981); *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 220-221 (1980) ("questions of public policy cannot be determinative of the outcome unless specific policy choices fairly can be attributed to Congress itself"); *Reiter* v. *Sonotone Corp.*, 442 U.S. at 345; *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435

be judicially enforceable if directed to the "targets" themselves. The court reasoned that notice of subpoenas issued to third parties was necessary to protect this right since, "[a]s a practical matter, * * * no one [other than the target] will question compliance with the *Powell* standards as to those subpoenas" (*ibid.*). The court added that third-party recipients of agency process "appear to lack standing to require an agency to conduct its investigation of a target consistently with *Powell*" (*ibid.*).

For several reasons, the court of appeals' reading of *Powell* is unsupportable.[28] First, *Powell* neither related to nor discussed third-party subpoenas. *Powell* did not address the "rights" of "targets." Indeed, *Powell* analogized administrative investigations to grand jury inquiries (379 U.S. at 57), the "targets" of which have no right to notice of subpoenas issued to others. See *Hannah* v. *Larche*, 363 U.S. at 449; *PepsiCo., Inc.* v. *SEC*, 563 F. Supp. 828, 831 (S.D.N.Y. 1983) (observing that *Powell* did not address "the power of a federal court to compel notice to an SEC target").

Second, *Powell* concerned the rights of a *recipient* of a summons, not the rights of a *"target."* The recipient of an IRS summons plainly has a right to question the Service's compliance with *Powell* before he turns over his records pursuant to the summons. Thus, the court of appeals was wrong in asserting (Pet. App. 7a) that "[t]hird-party recipients of agency process appear to lack standing to require an agency to conduct its investigation of a target consistently with *Powell*." [29]

---

U.S. 519, 524, 543-546 (1978); *FCC* v. *Schreiber*, 381 U.S. at 290-291.

[28] As the judges dissenting from the denial of rehearing en banc aptly stated (*id.* at 26a), the court's holding "goes beyond any reasonable interpretation of [*Powell*]."

[29] In support of this contention, the court of appeals cited (Pet. App. 7a) *Sierra Club* v. *Morton*, 405 U.S. 727, 733, 734-735 (1972), which concerned the "injury in fact" prong of the standing test. However, a person required to surrender documents in his possession would satisfy that standing requirement.

Third, the court of appeals' reading of *Powell* is at odds with this Court's subsequent decisions in *Donaldson* and *Miller*—decisions that did involve third-party summonses and the rights of "targets." In those decisions, this Court held that a "target" of an investigation has no right to question whether a summons directed to a third party should be judicially enforced. 400 U.S. at 521, 530-531; 425 U.S. at 446 n.9.[30]

In *Donaldson*, a taxpayer under investigation by the IRS sought to intervene in summons enforcement proceedings against third parties and argued that various requirements of *Powell* had not been met (see 400 U.S. at 521). The Court noted (*id.* at 531) that the records at issue would not be subject to suppression if the government obtained them "by other routine means, such as [a third party's] independent and voluntary disclosure prior to trial * * * or through [a third party's] appearance as a trial witness, or by subpoena of the records for trial." The Court concluded (*ibid.*) that the taxpayer did not have "a significantly protectable interest" in the records and therefore lacked the right to intervene. Certainly, a "target" who has no right to block voluntary disclosure of third-party records prior to trial, no right to preclude the admission of such records as evidence in a trial, and no right to intervene in summons enforcement proceedings involving such records has no enforceable "right to be investigated consistently with the *Powell* standards."

Fourth, *Powell* did not create procedures to be followed by the Internal Revenue Service in its investigations. *Powell* merely interpreted the statutory showing required where the Service seeks judicial assistance to enforce a summons. In the present case, by contrast, the court of appeals did not interpret procedures mandated by Congress but created procedures that are fundamentally at odds

[30] The court of appeals dismissed *Donaldson* and *Miller* as being "irrelevant to the present case" (Pet. App. 6a-7a). But these decisions, and not *Powell*, deal with and define the "target's" rights with respect to information held by third parties.

with Congress's intent. See pages 16-23, *supra*. Nothing in *Powell* supports such judicial interference with agency procedures, particularly where the agency has not even sought to invoke judicial assistance.

Finally, *Powell* construed provisions of the Internal Revenue Code,[31] and the Code clearly did not require notice of a third-party summons.[32] The court of appeals therefore had no basis to interpret *Powell*—a decision interpreting a statute that did not require notice to "targets"—to bolster its judicially devised notice requirement.

---

[31] Since *Powell* construed the Internal Revenue Code, rather than the securities laws, it is not directly applicable to the Commission. Some elements of the showing required under *Powell*, however, appear to overlap applicable Fourth Amendment standards (see *United States* v. *Miller*, 425 U.S. at 445-446). Since it is not an issue in this case, we do not discuss the precise extent to which the *Powell* standards apply to the Commission. We do note, however, that they do not necessarily apply to the same extent as they do to the IRS. See *In re EEOC*, 709 F.2d 392, 398 n.2 (5th Cir. 1983); *United States* v. *Thriftyman, Inc.*, 704 F.2d 1240, 1244-1245 (Temp. Emer. Ct. App. 1983); *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1377-1378 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980).

[32] Congress subsequently amended the tax laws to require the IRS to give a taxpayer notice of summonses directed to certain statutorily-defined "third-party recordkeepers" because "there [was] no legal requirement that the taxpayer (or other party) to whose business or transactions the summoned records relate be informed that a third-party summons has been served." S. Rep. 94-938 (Pt. 1), 94th Cong., 2d Sess. 368 (1976). See 26 U.S.C. 7609(3). See also *Kelley* v. *United States*, 536 F.2d 897, 899 (9th Cir. 1976), cert. denied, 429 U.S. 1047 (1977); *Scarafiotti* v. *Shea*, 456 F.2d 1052, 1053 (10th Cir. 1972); *In re Cole*, 342 F.2d 5, 8 (2d Cir.), cert. denied, 381 U.S. 950 (1965). Even after this amendment, a taxpayer is still not entitled to notice of or the opportunity to challenge an IRS summons directed to a third party who is not a "third-party recordkeeper" as defined by the Act. *United States* v. *Schutterle*, 586 F.2d 1201, 1204 (8th Cir. 1978).

**B. The Court Of Appeals' Notice Requirement Will Cause Serious Problems For Law Enforcement That Congress Could Not Have Intended**

Any lingering uncertainty about Congress's intent is dispelled by the adverse consequences that the court of appeals' notice requirement is certain to produce. The court of appeals' notice requirement will provide "targets" with a potent new weapon for use in obstructing and delaying important investigations. "Experience and common sense * * * establish that such a [requirement will] be greatly abused * * *." *PepsiCo., Inc.* v. *SEC*, 563 F. Supp. 828, 832 (S.D.N.Y. 1983).

1. Notice will provide "targets" with a road map of the investigation and a status report on its progress and direction. It will thereby substantially increase a "target's" opportunities to destroy documents, tailor testimony, fabricate defenses, and transfer stolen assets or securities beyond the reach of the government and injured investors. See *United States* v. *Sells Engineering, Inc.*, No. 81-1032 (June 30, 1983), slip op. 5; *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-219 (1979); *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 239 (1978). Furthermore, "targets" might bribe witnesses or threaten them with physical or economic retaliation in an effort to persuade them not to testify, to mold their testimony, or to commit perjury. *Ibid.* Witnesses who are employees or business associates of those under investigation are particularly vulnerable to such coercion. See *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. at 222; *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. at 239. And confidential informants, whose cooperation with the government is often not known to the "target," will be reluctant to come forward and testify if they know that their participation will be revealed to the "target." See *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. at 219; Pet.

App. 26a (Kennedy, J., dissenting from the denial of rehearing en banc).[33]

The threat of such activities has served as the basis for legislation to preserve the secrecy of agency investigations[34] and underlies the longstanding provision for secrecy in grand jury proceedings. See *United States* v. *Sells Engineering, Inc.*, slip op. 5; *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. at 218-219; *United States* v. *Proctor & Gamble*, 356 U.S. 677, 681 (1958); Fed. R. Crim. P. 6(e). "Targets" of grand jury proceedings have no right to notice of the identities of persons subpoenaed to testify,[35] and "targets" of Commission investigations likewise should not be given such a right.[36]

---

[33] Notice also would needlessly expose innocent witnesses and subjects to prejudicial publicity. A witness's participation in an investigation could lead to unfair speculation that he is suspected of wrongdoing. Cf. *United States* v. *Sells Engineering Inc.*, No. 81-1032 (June 30, 1983), slip op. 5; *Illinois* v. *Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983), slip op. 5 n.8. Congress has recognized these privacy interests in the Freedom of Information Act. See 5 U.S.C. 552(b)(7)(C); *FBI* v. *Abramson*, 456 U.S. 615 (1982). Furthermore, premature disclosure of Commission investigations of companies could adversely affect the prices of securities.

[34] When Congress enacted the Administrative Procedure Act, it authorized administrative agencies to withhold transcripts of investigative testimony if their release might interfere with an investigation. See Section 6(b) of the Administrative Procedure Act, ch. 324, 60 Stat. 240, now recodified at 5 U.S.C. 555(c); S. Rep. 752, 79th Cong., 1st Sess. (1945); H.R. Rep. 1980, 79th Cong., 2d Sess. (1946); *Commercial Capital Corp.* v. *SEC*, 360 F.2d 856, 858 (7th Cir. 1966). And in enacting the Freedom of Information and Privacy Acts, Congress created an exemption for information contained in active law enforcement investigative files. See 5 U.S.C. 552(b)(7)(A); 5 U.S.C. 552a(k)(2).

[35] *See United States* v. *Bright*, 630 F.2d 804, 811 (5th Cir. 1980); *SEC* v. *Dresser Industries, Inc.*, 628 F.2d at 1382; *Archer* v. *United States*, 393 F.2d 124, 125-126 (5th Cir. 1968).

[36] Respondent O'Brien argues (Br. in Opp. 25-33) that Commission investigatory subpoenas are distinguishable from grand jury

As this Court has expressly recognized, agency investigations, such as those conducted by the Commission, are analogous to grand jury proceedings in many respects, including their need for secrecy.[37]

2. Notice also will encourage needless litigation by arming "targets" with a tool to delay investigations and subsequent law enforcement proceedings. "Targets" might encourage witnesses not to comply with legitimate subpoenas, thereby forcing the agency to seek judicial enforcement in many instances in which it would not other-

---

subpoenas because they are not subject to the same restraints. Although the checks on Commission officers using subpoenas are different from those on prosecutors seeking grand jury subpoenas, the former are nevertheless substantial. First, as we have discussed, pages 10-14, *supra*, the Commission retains close supervision and control of the use of its subpoena powers through, among other mechanisms, the formal order. Second, all Commission employees, including officers appointed to conduct investigations, must adhere to the Commission's Canons of Ethics, which include a prohibition against "participat[ion] in an investigation aimed at a particular individual for reasons of animus, prejudice or vindictiveness * * *." 17 C.F.R. 200.66; see 17 C.F.R. 200.735-2(b) (requiring Commission employees to abide by Canons of Ethics). And, third, as already noted, Commission subpoenas are not self-executing. The Commission must apply to a federal district court to enforce compliance and, in such a proceeding, the respondent may raise any appropriate defenses.

Congress has noted these internal controls and has commended the Commission's "excellent record with respect to the use of its subpoena authority." H.R. Rep. 96-1321, 96th Cong., 2d Sess. 5 (1980). Thus, in practice, the Commission's control of subpoenas issued by its staff may greatly exceed the control by grand juries of subpoenas issued under their authority.

[37] *Hannah* v. *Larche*, 363 U.S. at 449 & n.30 (citing *Woolley* v. *United States*, 97 F.2d 258, 262 (9th Cir.), cert. denied, 305 U.S. 614 (1938), and *Consolidated Mines* v. *SEC*, 97 F.2d 704, 708 (9th Cir. 1938), in which courts of appeals likened SEC investigations to grand jury proceedings). See also *United States* v. *Powell*, 379 U.S. at 57; *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 216 (1946).

wise be necessary.[38] Even if a witness desires to comply voluntarily with a subpoena, "targets" armed with advance notice can be expected to file frivolous actions to delay compliance.[39] In addition, under the rationale of the court of appeals (Pet. App. 7a), "targets" may seek to intervene in numerous subpoena enforcement proceedings for purposes of delay.[40] If intervention is allowed, "targets" could prolong subpoena enforcement proceedings by requesting discovery and evidentiary hearings.[41] In sum,

---

[38] As the district court observed in *PepsiCo*, "[o]ne could readily envision investigations in which several targets raise separate objections to each subpoena an agency serves." 563 F. Supp. at 832. Indeed, respondents' tactics in this investigation demonstrate the pernicious effects that may result from notice (see pages 3-6, *supra*).

[39] See *Sprecher* v. *Graber*, 716 F.2d 968, 971 (2d Cir. 1983) (opposition to SEC subpoena was "frivolous and interposed solely for delay"); *Atlantic Richfield Co.* v. *FTC*, 546 F.2d 646, 647 (5th Cir. 1977).

[40] See, *e.g.*, *Donaldson* v. *United States*, 400 U.S. 517 (1971); *Reisman* v. *Caplin*, 375 U.S. 440 (1964); *FSLIC* v. *First National Development Corp.*, 497 F. Supp. 724, 729, 732 (S.D. Tex. 1980) (court found that motions to intervene in subpoena enforcement action were "primarily motivated by [movants'] desire to impede the FSLIC investigation").

[41] In this Court, respondent O'Brien suggests that the Commission's concerns about delay are speculative since "subpoena-enforcement actions are summary proceedings" (Br. in Opp. 18). But, in the court of appeals, respondent argued that a person challenging a Commission subpoena may be entitled to discovery and an evidentiary hearing (O'Brien Reply Br. 5-6). Although some courts have held that evidentiary hearings are appropriate only after the person seeking such a hearing has made a factual showing that the subpoena was issued for an invalid purpose (see *SEC* v. *Knopfler*, 658 F.2d 25, 26 (2d Cir. 1981), cert. denied, 455 U.S. 908 (1982); *SEC* v. *Howatt*, 525 F.2d 226, 229 (1st Cir. 1975)), other courts have held that evidentiary hearings are more readily available. See, *e.g.*, *United States* v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Garden State National Bank*, 607 F.2d 61 (3d Cir. 1979); *United States* v. *Church of Scientology*, 520 F.2d 818 (9th Cir. 1975). Moreover, experience demonstrates that subpoena enforcement actions are not always re-

the court of appeals' holding encourages the use of the federal judicial system for dilatory purposes.

Even if a "target's" challenges to third-party subpoenas are ultimately unsuccessful, he may nevertheless achieve his broader objective of derailing the Commission's investigation. Delay is particularly inimical to the Commission's ability to act promptly to protect the integrity of the nation's securities markets from manipulation and other misconduct.[42] Delay may also preclude referral of a matter to the Department of Justice at the conclusion of an investigation because of statutes of limitations on criminal prosecutions.

Moreover, if the Commission were required to respond to such challenges, it "would be diverted from [its] legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable." *Hannah* v. *Larche*, 363 U.S. at 443; cf. *FTC* v. *Standard Oil Co.*, 449 U.S. at 242; *Donaldson* v. *United States*, 400 U.S. at 529. As one district court stated in rejecting the court of appeals' decision in this case,

> the limited resources presently available in our agencies to enforce the nation's public policies would be significantly reduced because of procedural maneuvering and other even less wholesome tactics.

*PepsiCo, Inc.* v. *SEC*, 563 F. Supp. at 832.

3. The requirement that persons under inquiry receive notice of subpoenas issued to witnesses also would inject

---

solved quickly. See, *e.g.*, *Penfield Co.* v. *SEC*, 330 U.S. 585, 592 (1947) (finding that witness's refusal to comply with Commission subpoena evidenced a "long, persistent effort to defeat the investigation").

[42] Congress has recognized that the Commission must be able to move promptly to prevent manipulation of the securities markets. H.R. Rep. 96-1321 (Pt. 1), at 8 (footnote omitted). See also *SEC* v. *Dresser Industries, Inc.*, 628 F.2d at 1377.

substantial uncertainty into law enforcement and jeopardize pending investigations. Although it required notice to "targets" when third-party subpoenas are served, the court of appeals made no effort to resolve such fundamental questions as the definition of a "target," the procedures for determining whether a person or firm is a "target," the rights of "targets" following receipt of notice, and the effect of noncompliance with the notice requirement. See *PepsiCo, Inc.* v. *SEC*, 563 F. Supp. at 832. Even the threshold question—what is a "target"?—is far from clear. The Commission's statutes and rules do not use that term. There are, of course, investigations in which specific entities or persons are suspect, but the Commission's inquiries often focus on transactions rather than individuals.[43] Is a "target" any person or firm about whose activities information is gathered? As the investigation gradually develops facts, is it anyone who starts to come into focus as a possible law violator? Is it anyone suspected by the Commission staff? ~~It is~~ anyone against whom sufficient evidence has been received to permit the initiation of administrative proceedings? Or the filing of an injunctive action? Or referral of the case for criminal prosecution?

---

[43] For example, the Commission may investigate unusual trading preceding the announcement of a tender offer for the purpose of determining whether someone traded with advance knowledge of the tender offer in violation of antifraud provisions of the securities laws. In such a case, the Commission might not know which of the thousands of traders who purchased stock of the target company in the days prior to the announcement may be potential subjects. And, in some such cases, the Commission is required to file an enforcement action before identifying all culpable persons. See, *e.g.*, *SEC* v. *Certain Unknown Purchasers of the Common Stock of, and Call Options for, the Common Stock of Santa Fe Int'l Corp.*, No. 81 Civ 6553 (WCC) (S.D.N.Y. Nov. 13, 1981) (freezing assets in bank accounts); *SEC* v. *Musella*, No. 83 Civ 342 (CSH) (S.D.N.Y. Jan. 19, 1984) (preliminary injunction and temporary freeze of profits of alleged insider trading against defendant not identified until several months after complaint filed).

And how are the courts to proceed when a party who has not received notice but claims to be a "target" seeks intervention in enforcement proceedings or initiates one of the "other appropriate district court proceedings" to which the court of appeals referred (Pet. App. 7a)? Must the Commission disclose the evidence it has gathered so that its decision not to provide "target" notice can be reviewed? Is that judgment to be revisited as the investigation continues and more evidence is received? While these and other issues are being resolved on a case-by-case basis, numerous Commission and other law enforcement investigations may be at risk. And needless to say, the resolution of these issues would require an extensive commitment of federal judicial resources.

4. These fears are not speculative. As a result of the court of appeals' decision, the Commission's investigations already have been seriously disrupted. The Commission has postponed many investigations in the states comprising the Ninth Circuit [44] and modified the scope of others. In one instance, the Commission's inability to determine how to apply the decision compelled it to give *public* notice of all subpoenas rather than running the risk of having its investigation compromised by litigation alleging that it failed to provide notice to all "targets." [45]

In addition, "[t]here is no principled basis for confining the [court of appeals'] holding to the context of an SEC investigation. It threatens to compromise govern-

---

[44] Notwithstanding its stay of the mandate pending this Court's review, the court of appeals has held that its *O'Brien* decision has stare decisis effect in district courts in the Ninth Circuit. *Wedbush, Noble, Cooke, Inc.* v. *SEC*, 714 F.2d 923, 928 (1983) (Pet. App. 30a).

[45] *In re Transactions in Washington Public Power Supply System Securities*, No. HO-1556 (SEC Jan. 11, 1984) (Order directing private investigation and designating officers to take testimony). 49 Fed. Reg. 2035 (1984). While this type of proceeding ensures that all interested persons—including "targets" however defined—will have notice of subpoenas, it deprives witnesses of the confidentiality that those who testify in Commission investigations normally enjoy.

ment investigations by most agencies" (Pet. App. 26a). See *PepsiCo. Inc* v. *SEC*, 563 F. Supp. at 832.[46] More than 100 federal law enforcement and other programs depend upon subpoenas that are issued, without notice to "targets," pursuant to statutes analogous to the Commission's. See Pet. 18-25; *Hannah* v. *Larche*, 363 U.S. at 427. Like the Commission, these agencies must seek judicial enforcement of their subpoenas. See *id.* at 427 n.9. Thus, the court of appeals' rationale would appear to be applicable to virtually all law enforcement agencies that issue investigative subpoenas without third-party notice.

5. In sum, it is most unlikely that Congress intended to impose a notice requirement that would have such obvious and deleterious consequences. At the very least, Congress could be expected to give serious consideration to the danger of such consequences before insisting upon notice to "targets." However, with the exception of Section 21(h) of the Securities Exchange Act and the RFPA, which contain a narrow, carefully crafted notice requirement, there is no evidence that Congress ever considered the consequences of providing "targets" with notice of third-party subpoenas. It would be unwarranted to "infer that Congress has exercised such a power without affirmatively expressing its intent to do so." *Illinois* v. *Abbott & Associates, Inc.*, No. 81-1114 (Mar. 29, 1983), slip op. 14.

---

[46] The court of appeals' decision already has been relied upon to challenge law enforcement investigations of other agencies. See, *e.g.*, *Alaska Teamster-Employer Pension Trust* v. *Donovan*, No. C-83-4636-RPA (N.D. Cal. filed Oct. 3, 1983) (challenging lawfulness of Department of Labor investigative subpoenas issued without prior notice); *Kahn* v. *Phillips*, No. 84-0346 (D.D.C. filed Feb. 1, 1984) (action to enjoin Commodity Futures Trading Commission administrative proceeding based on agency's failure to give notice of subpoena issued in underlying investigation).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
*Solicitor General*

KENNETH S. GELLER
*Deputy Solicitor General*

DANIEL L. GOELZER
*General Counsel*

SAMUEL A. ALITO, JR.
*Assistant to the Solicitor General*

PAUL GONSON
*Solicitor*

LINDA D. FIENBERG
*Associate General Counsel*

LARRY R. LAVOIE
*Assistant General Counsel*

HARRY J. WEISS
*Special Trial Counsel*

RUTH E. EISENBERG
*Special Counsel*

ELIZABETH A. SPURLOCK
*Attorney*
*Securities and Exchange Commission*

FEBRUARY 1984

## ADDENDUM

Section 21(h) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(h) provides:

(1) The Right to Financial Privacy Act of 1978 shall apply with respect to the Commission, except as otherwise provided in this subsection.

(2) Notwithstanding section 1105 or 1107 of the Right to Financial Privacy Act of 1978, the Commission may have access to and obtain copies of, or the information contained in financial records of a customer from a financial institution without prior notice to the customer upon an ex parte showing to an appropriate United States district court that the Commission seeks such financial records pursuant to a subpena issued in conformity with the requirements of section 19(b) of the Securities Act of 1933, section 21(b) of the Securities Exchange Act of 1934, section 18(c) of the Public Utility Holding Company Act of 1935, section 42(b) of the Investment Company Act of 1940, or section 209(b) of the Investment Advisers Act of 1940, and that the Commission has reason to believe that—

(A) a delay in obtaining access to such financial records, or the required notice, will result in—

(i) flight from prosecution;

(ii) destruction of or tampering with evidence;

(iii) transfer of assets or records outside the territorial limits of the United States;

(iv) improper conversion of investor assets; or

(v) impeding the ability of the Commission to identify or trace the source or disposition of funds involved in any securities transaction;

(B) such financial records are necessary to identify or trace the record or beneficial ownership interest in any security;

(C) the acts, practices or course of conduct under investigation involve—

(i) the dissemination of materially false or misleading information concerning any security, issuer, or market, or by the failure to make disclosures required under the securities law, which remain uncorrected; or

(ii) a financial loss to investors or other persons protected under the securities laws which remains substantially uncompensated; or

(D) the acts, practices or course of conduct under investigation—

(i) involve significant financial speculation in securities; or

(ii) endanger the stability of any financial or investment intermediary.

(3) Any application under paragraph (2) for a delay in notice shall be made with reasonable specificity.

(4) (A) Upon a showing described in paragraph (2), the presiding judge or magistrate shall enter an ex parte order granting the requested delay for a period not to exceed ninety days and an order prohibiting the financial institution involved from disclosing that records have been obtained or that a request for records has been made.

(B) Extensions of the period of delay of notice provided in subparagraph (A) of up to ninety days each may be granted by the court upon application, but only in accordance with this subsection or section 1109(a), (b)(1), or (b)(2) of the Right to Financial Privacy Act of 1978.

(C) Upon expiration of the period of delay of notification ordered under subparagraph (A) or (B), the customer shall be served with or mailed a copy of the subpena insofar as it applies to the customer together with the following notice which shall prescribe with rea-

sonable specificity the nature of the investigation for which the Commission sought the financial records:

"Records or information concerning your transactions which are held by the financial institutions named in the attached subpena were supplied to the Securities and Exchange Commission on (date), Notification was, withheld pursuant to a determination by the (title of court so ordering) under Section 21(h) of the Securities Exchange Act of 1934 that (state reason). The purpose of the investigation or official proceeding was (state purpose)."

(5) Upon application by the Commission, all proceedings pursuant to paragraphs (2) and (4) shall be held in camera and the records thereof sealed until expiration of the period of delay or such other date as the presiding judge or magistrate may permit.

(6) The Commission shall compile an annual tabulation of the occasions on which the Commission used each separate subparagraph or clause of paragraph (2) of this subsection or the provisions of the Right to Financial Privacy Act of 1978 to obtain access to financial records of a customer and include it in its annual report to the Congress. Section 1121(b) of the Right to Financial Privacy Act of 1978 shall not apply with respect to the Commission.

(7)(A) Following the expiration of the period of delay of notification ordered by the court pursuant to paragraph (4) of this subsection, the customer may, upon motion, reopen the proceeding in the district court which issued the order. If the presiding judge or magistrate finds that the movant is the customer to whom the records obtained by the Commission pertain, and that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), it may order that the customer be granted civil penalties against the Commission in an amount of equal to the sum of—

(i) $100 without regard to the volume of records involved;

(ii) any out-of-pocket damages sustained by the customer as a direct result of the disclosure; and

(iii) if the violation is found to have been willful, intentional, and without good faith, such punitive damages as the court may allow, together with the costs of the action and reasonable attorney's fees as determined by the court.

(B) Upon a finding that the Commission has obtained financial records or information contained therein in violation of this subsection, other than paragraph (1), the court, in its discretion, may also or in the alternative issue injunctive relief to require the Commission to comply with this subsection with respect to any subpena which the Commission issues in the future for financial records of such customer for purposes of the same investigation.

(C) Whenever the court determines that the Commission has failed to comply with this subsection, other than paragraph (1), and the court finds that the circumstances raise questions of whether an officer or employee of the Commission acted in a willful and intentional manner and without good faith with respect to the violation, the Office of Personnel Management shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the agent or employee who was primarily responsible for the violation. After investigating and considering the evidence submitted, the Office of Personnel Management shall submit its findings and recommendations to the Commission and shall send copies of the findings and recommendations to the officer or employee or his representative. The Commission shall take the corrective action that the Office of Personnel Management recommends.

(8) The relief described in paragraphs (7) and (10) shall be the only remedies or sanctions available to a

customer for a violation of this subsection, other than paragraph (1), and nothing herein or in the Right to Financial Privacy Act of 1978 shall be deemed to prohibit the use of any investigation or proceeding of financial records, or the information contained therein obtained by a subpena issued by the Commission. In the case of an unsuccessful action under paragraph (7), the court shall award the costs of the action and attorney's fees to the Commission if the presiding judge or magistrate finds that the customer's claims were made in bad faith.

(9)(A) The Commission may transfer financial records or the information contained therein to any government authority if the Commission proceeds as a transferring agency in accordance with section 1112 of the Right to Financial Privacy Act of 1978, except that the customer notice required under section 1112(b) or (c) of such Act may be delayed upon a showing by the Commission, in accordance with the procedure set forth in paragraphs (4) and (5), that one or more of subparagraphs (A) through (D) of paragraph (2) apply.

(B) The Commission may, without notice to the customer pursuant to section 1112 of the Right to Financial Privacy Act of 1978, transfer financial records or the information contained therein to a State securities agency or to the Department of Justice. Financial records or information transferred by the Commission to the Department of Justice or to a State securities agency pursuant to the provisions of this subparagraph may be used only in an administrative, civil, or criminal action or investigation by Department of Justice or the State securities agency which arises out of or relates to the acts, practices, or courses of conduct investigated by the Commission, except that if the Department of Justice or the State securities agency determines that the information should be disclosed or used for any other purpose, it may do so if it notifies the customer, except as otherwise provided in the Right to Financial Privacy Act of 1978,

within 30 days of its determination, or complies with the requirements of section 1109 of such Act regarding delay of notice.

(10) Any government authority violating paragraph (9) shall be subject to the procedures and penalties applicable to the Commission under paragraph (7)(A) with respect to a violation by the Commission in obtaining financial records.

(11) Notwithstanding the provisions of this subsection, the Commission may obtain financial records from a financial institution or transfer such records in accordance with provisions of the Right to Financial Privacy Act of 1978.

(12) Nothing in this subsection shall enlarge or restrict any rights of a financial institution to challenge requests for records made by the Commission under existing law. Nothing in this subsection shall entitle a customer to assert any rights of a financial institution.

(13) Unless the context otherwise requires, all terms defined in the Right to Financial Privacy Act of 1978 which are common to this subsection shall have the same meaning as in such Act.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 434083 271